

APPEAL BRIEF

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	§	
Timothy A. Meserth, <i>et al.</i>	§	Group Art Unit: 2179
	§	
Serial No.: 10/075,861	§	Examiner: Sara M. Hanne
	§	
Filed: February 14, 2002	§	Atty Docket No.: RPS920010150US1
	§	
Title: System And Method For	§	Customer No.: 56102
Controlling Real-Time Display	§	
	§	Confirmation No.: 9416

Mail Stop: Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

APPEAL BRIEF

Honorable Commissioner:

This is an Appeal Brief filed pursuant to 37 CFR § 41.37 in response to the Final Office Action of November 30, 2009 (hereinafter the “Office Action”), and pursuant to the Notice of Appeal filed February 24, 2010.

REAL PARTY IN INTEREST

The real party in interest in accordance with 37 CFR § 41.37(c)(1)(i) is the patent assignee, International Business Machines Corporation (“IBM”), a New York corporation having a place of business at Armonk, New York 10504.

RELATED APPEALS AND INTERFERENCES

On November 19, 2008, the Board of Patent Appeals and Interferences (‘BPAI’) rendered a decision on Appeal No. 2008-2296 for the present application reversing the Examiner’s

rejections. A copy of the November 19, 2008 decision on Appeal No. 2008-2296 was filed with the present Appeal Brief.

STATUS OF CLAIMS

Status of claims in accordance with 37 CFR § 41.37(c)(1)(iii): Twenty one (21) claims were filed in the original application in this case. Claims 1-21 are rejected in the Office Action. Claims 1-21 are on appeal.

STATUS OF AMENDMENTS

Status of amendments in accordance with 37 CFR § 41.37(c)(1)(iv): No amendments were submitted after final rejection. The claims as currently presented are included in the Appendix of Claims that accompanies this Appeal Brief.

SUMMARY OF CLAIMED SUBJECT MATTER

Appellants provide the following concise summary of the claimed subject matter according to 37 CFR § 41.37(c)(1)(v). This summary includes a concise explanation of the subject matter defined in each of the independent claims involved in the appeal and includes references to Appellant's original specification by page, line number, paragraph number, and to the drawings by elements. The three independent claims involved in this appeal are claims 1, 8, and 15.

Claim 1 recites a method of representing real time data in a graphical format on a display of a data processing system, that includes providing a user positionable icon as a portion of the display (page 4, lines 24-25), determining the position of the icon (page 5, lines 27-29 and Figure 3, elements 312 and 306), and refreshing the graphical representation responsive to receiving a new data point (page 5, lines 17-18; page 5, line 29 – page 6, line 2; and Figure 3, elements 302 and 308), where the position of the icon determines how much historical data is retained in the refreshed display (page 4, lines 25-27 and

page 6, lines 29-31).

Claim 8 recites a data processing system, including a processor, memory, and a display (page 3, line 8 – page 4 line 3, and Figure 1, elements 102, 104, 106 and 113), that includes computer code means for representing real time data in a graphical format on the display (page 4, lines 22-24); computer code means for displaying a user-positionable icon as part of the graphical representation (page 4, lines 22-24) and for determining the position of the icon (page 5, lines 27-29 and Figure 3, elements 312 and 306); and computer code means for refreshing the graphical representation responsive to receiving a new data point (page 5, lines 17-18; page 5, line 29 – page 6, line 2; and Figure 3, elements 302 and 308), where the position of the icon determines how much historical data is retained in the refreshed display (page 4, lines 25-27 and page 6, lines 29-31).

Claim 15 recites a computer program product for displaying real time data on a data processing system, the product being stored on a computer readable medium (page 4, lines 4-7 and Figure 1, element 106), where the computer program product includes: computer code means for generating a graphical representation of the real time data on the display wherein the graphical representation includes a horizontal axis representing time and a vertical axis represents a parameter of interest (page 4, lines 22-24); computer code means for displaying a user-positionable icon as part of the graphical representation (page 4, lines 22-24) and for determining the position of the icon wherein the user positionable icon is moveable along the horizontal axis (page 5, lines 27-29 and Figure 3, elements 312 and 306); and computer code means for refreshing the graphical representation responsive to receiving a new data point (page 5, lines 17-18; page 5, line 29 – page 6, line 2; and Figure 3, elements 302 and 308), where the position of the icon along the horizontal axis determines how much historical data is retained in the refreshed graphical representation (page 4, lines 25-27 and page 6, lines 29-31).

GROUND'S OF REJECTION

In accordance with 37 CFR § 41.37(c)(1)(vi), Appellants provide the following concise

statement for each ground of rejection:

1. Claims 1-21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Takahashi (U.S. Patent No. 5,999,162) in view of Venolia (U.S. Publication No. 2008/0204477).

ARGUMENT

Appellants present the following argument pursuant to 37 CFR § 41.37(c)(1)(vii) regarding the ground of rejection on appeal in the present case.

Argument Regarding The First And Only Ground Of Rejection On Appeal: Claims 1-21 Stand Rejected Under 35 U.S.C. § 103 As Being Unpatentable Over Takahashi In View Of Venolia

Claims 1-21 stand rejected under 35 U.S.C. § 103 as unpatentable over Takahashi (U.S. Patent No. 5,999,162) in view of Venolia (U.S. Publication No. 2008/0204477). The question of whether Appellant's claims are obvious or not is examined in light of: (1) the scope and content of the prior art; (2) the differences between the claimed invention and the prior art; (3) the level of ordinary skill in the art; and (4) any relevant secondary considerations, including commercial success, long felt but unsolved needs, and failure of others. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1729-1730, 82 USPQ 1385 (2007). Although Appellant recognizes that such an inquiry is an expansive and flexible one, the Office Action must nevertheless demonstrate a prima facie case of obviousness to reject Appellant's claims for obviousness under 35 U.S.C. § 103(a). *In re Khan*, 441 F.3d 977, 985-86 (Fed. Cir. 2006). To establish a prima facie case of obviousness, the proposed combination of Takahashi and Venolia must teach or suggest all of Appellant's claim limitations. MPEP 2142 (citing *In re Royka*, 490 F.2d 981, 985, 180 USPQ 580, 583 (CCPA 1974)). The proposed combination cannot establish a prima facie case of obviousness because the proposed combination does not teach each and every element of the claims of the present application. As such, Appellant respectfully traverses the rejection.

The independent claims 1, 8, and 15 recite in pertinent part:

representing real time data in a graphical format on a display,

a user positionable icon as a portion of the display, and

refreshing the graphical representation responsive to receiving a new data point, wherein the position of the icon determines how much historical data is retained in the refreshed display.

Regarding these elements of the independent claims, the Office Action indicates:

Takahashi et al. teaches an icon as a portion of the display (winding-up position, Figure 10) determining the position of the icon (predetermined) and refreshing the graphical representation responsive to receiving a new data point (Column 4, lines 45-53), wherein the position of the icon determines how much historical data is retained in the refreshed display (Column 2, lines 11-20). While Takahashi et al. teaches refreshing the display where the amount of information to be retained is based on a user determined position, ...

Appellants respectfully submit in response that these arguments regarding Takahashi are literally, word-for-word, the position taken regarding Takahashi on page 3 of the Examiner's Answer date June 18, 2007 in the prior appeal of this application before the Board Of Patent Appeals And Interferences ('BPAI'). The BPAI, in rejecting the Examiner's arguments on appeal, beginning at page 5 of its decision of November 19, 2008 states:

While we agree with the Examiner that the end result of moving the graphical representation when refreshed to retain a predetermined amount of historical data is similar between Takahashi and the claimed invention, it is the manner in which the claimed invention achieves the end result which is being specifically claimed.

That is, the BPAI effectively holds that Takahashi does not teach or suggest the claimed invention. The BPAI at page 6 of its decision discusses more specifically the failures of Takahashi:

From our review of the teachings of Takahashi and the specific portions relied upon by the Examiner, we find no express or implied teaching that the dashed line shown in the display of figure 10 of Takahashi or the dashed lines on the display in any of the other figures of Takahashi are actually visible on the display and could be correlated as “icons” that are positionable by the user.

That is, the BPAI holds that whatever Takahashi discloses, it is not a user positionable icon as claimed in the present application. Having not disclosed a user positionable icon, Takahashi cannot disclose a user positionable icon where the position of the icon determines how much historical data is retained in a refreshed display of a graphical representation of real time data as claimed here. Continuing on at page 6 of its decision, the BPAI states:

While the Examiner identifies the “predetermined position” and that the “operator can freely adjust the wind up speed and position” in column 10 of Takahashi, Takahashi is silent as to how the user or operator would implement those changes to the predetermined position. Here, we are left to speculate as to how the wind-up mechanism interfaces with the user. We note that in figure 7, box 585, Takahashi identifies that x=winding-up position as a preset and in figure 9, box 96, identifies that x=winding-up position, but Takahashi does not teach or suggest any methodology for setting that winding-up value.

Emphasis added. Here, the BPAI states that Takahashi does not disclose “any methodology” for a user positioning an icon and as such, cannot disclose a user positionable icon. At page 7 of its decision the BPAI effectively holds that Takahashi does not teach or fairly suggest “a user positionable icon as a portion of the display ... wherein the position of the icon determines how much historical data is retained in the refreshed display of independent claim 1.” In sum, the BPAI holds that:

- Takahashi does not teach an icon as a portion of the display as claimed here,
- Takahashi does not teach determining the position of the icon as claimed here,
- Takahashi does not teach wherein the position of the icon determines how much historical data is retained in the refreshed display as claimed here, and

- Takahashi does not teach refreshing the display where the amount of information to be retained is based on a user determined position of an icon as claimed here.

All of these matters are, therefore, *res judicata* - settled by judgment of the BPAI, not subject to further dispute. As a practical matter in this case, Takahashi is effectively no longer available as a reference against the claims of the present case. For this reason alone, the combination of Takahashi and Venolia cannot teach or suggest each and every element and limitation of the claims and the rejections under 35 U.S.C. § 103 should be reversed.

In response to the arguments set forth above, the Office Action at page 6 sets forth the following:

The BPAI opinion states that Takahashi teaches the end result of moving the graphical representation when refreshed to retain a predetermined amount of historical data about a determined predetermined position but does not teach the predetermined position to be icons positionable by the user. Takahashi teaches moving the graphical representation when refreshed around a predetermine position set somehow by the system (winding-up position). Even if Takahashi did not teach the icon, it is taught by Venolia.

That is, the Office Action reads the BPAI decision to *only* hold that Takahashi does not disclose a user positionable icon as claimed here. The Office Action relies on Venolia to cure this deficiency of Takahashi. Appellants respectfully submit in response that: (1) the Office Action incorrectly limits the holding of BPAI decision in this case with regard to Takahashi and (2) even if the Office Action's reading of the BPAI decision is correct, Venolia does not cure the deficiencies of Takahashi.

The Office Action characterizing the scope of BPAI decision in such a way as to limit the holding to: "Takahashi does not disclose a user positionable icon as claimed in the present application." While the BPAI decision does in fact hold that Takahashi fails to disclose a user positionable icon, the BPAI decision also holds at page 5, cited above, that Takahashi only discloses a similar (not necessarily identical) end result of "moving the

graphical representation when refreshed to retain a predetermined amount of historical data,” but does not disclose “the manner in which the claimed invention achieves the end result.” The manner in which the claimed invention achieves the end result is, of course, the elements and limitations of the claims. The BPAI therefore holds that elements and limitations of the claims are not taught or suggested by Takahashi. Appellants further submit that the BPAI’s choice and use of the word ‘similar’ in comparing the end results of Takahashi and the claims of the present application is significant. Rather using a word such as ‘identical’ or a phrase such as ‘the same,’ the BPAI uses a word defined in the online Merriam-Webster dictionary at www.m-w.com as:

- 1 : having characteristics in common : strictly comparable
- 2 : alike in substance or essentials :

That is, the BPAI hedges even the comparison of the end results of Takahashi and the present claims to having characteristics in common or essentials or substances alike rather than stating the two end results are identical or the same. If the BPAI held that even the end results of Takahashi and the claims of the present invention are not exactly the same, it is no surprise that the BPAI held that Takahashi failed to disclose or fairly suggest the claim elements that obtain such end results. For the reasons set forth above, Appellants respectfully submit that the Office Action’s interpretation, characterization, and reading of the BPAI’s prior decision on appeal in this case is overly limiting and incorrect. Instead, Appellants reading and interpretation of the decision – that the BPAI held that Takahashi fails to disclose or suggest *all* elements of the claims – is correct.

Regarding, Venolia the Office Action indicates that Venolia teaches “a user-positionable icon as a portion of the display controlling the amount of information to be retained onscreen (Figure 5 with corresponding text and par. 47, 81).” Figure 5 of Venolia discloses a screen shot of a Zooming History Controller display. Venolia’s Zooming History Controller is described at paragraph [0044]:

[0044] The present invention as applied to the Zooming History Controller enables the user to browse the time domain at any time scale

(magnification) or choose an incremental time value by successive refinement. The Zooming History Controller zooms on a time continuum for picking a date/time. This is accomplished by utilizing a mouse in the manner described above.

That is, Figure 5 of Venolia and corresponding text discloses a Zooming History Controller enabling a user to browse a time scale at any magnification. Venolia's display relating to the scale however is not graphical display of real time data and there is no disclosure that the display is refreshed responsive to receiving a new data point. Having not disclose real time data or a refresh of a graphical display responsive to receiving a new data point (a new real time data point), Venolia's Zooming History Controller cannot possibly disclose a user positionable icon, the position of which determines how much historical data (historical real time data) that is retained in the refreshed display. Venolia simply describes zooming into a display – Venolia has nothing whatsoever to do with real time data. As such, it is no surprise that Venolia does not disclose refreshing a graphical representation of real time data responsive to receiving a new data point, wherein the position of the icon determines how much historical data is retained in the refreshed display.

At paragraph [0047], Venolia discloses a user-variable timeline and at paragraph [0081] Venolia discloses a display of a selected video frame (par. 81), none of which teaches or suggests the position of any icon determining, upon receiving a new data point, how much historical (real time) data is retained on a graphical representation of real time data that is refreshed responsive to receipt of a new (real time) data point as claimed here.

Summary Of Arguments Presented Above

- The Appellants, the Office Action, and BPAI prior's decision agree: Takahashi does not disclose or fairly suggest a user positionable icon where the position of

the icon determines how much historical data is retained in a refreshed display of a graphical representation of real time data as claimed here

- The BPAI held in its prior decision and the Appellants submit again in the Brief that Takahashi does not disclose or fairly suggest any of the elements of the independent claims.
- The holdings of the BPAI in the prior decision in this case effectively remove Takahashi as reference and all rejections of the claims that rely on Takahashi are *res judicata*, settled by judgment of the BPAI, and subject to no further dispute.
- The Office Actions characterization of the BPAI's prior decision overly limits the scope of the holdings, but even if the holdings are of limited scope, Venolia does not cure the deficiencies of Takahashi.

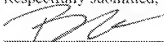
For the reasons set forth above, the proposed combination Takahashi and Venolia under 35 U.S.C. § 103. Regarding the dependent claims, Appellants respectfully submit that each dependent claim includes all of the elements and limitations of the independent claim from which it depends. And all of the independent claims include the limitations discussed above that are *not* taught or suggested by the combination of Takahashi and Venolia. The independent claims are therefore patentable under 35 U.S.C. § 103 for the same reasons as the independent claims.

In view of the arguments above, reversal on all grounds of rejection is requested.

APPEAL BRIEF

The Commissioner is hereby authorized to charge or credit Deposit Account No. 50-0563 for any fees required or overpaid.

Date: April 13, 2010

Respectfully submitted,

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APPENDIX OF CLAIMS
ON APPEAL IN PATENT APPLICATION OF
MESERTH, ET AL, SERIAL NO. 10/075,861

CLAIMS

What is claimed is:

1. A method of representing real time data in a graphical format on a display of a data processing system, comprising:

providing a user positionable icon as a portion of the display;

determining the position of the icon; and

refreshing the graphical representation responsive to receiving a new data point, wherein the position of the icon determines how much historical data is retained in the refreshed display.
2. The method of claim 1, wherein the graphical representation is refreshed when the graphical representation is full.
3. The method of claim 2, wherein the refreshing the representation comprises shifting all data points horizontally by a displacement, wherein the displacement is determined by the position of the icon.
4. The method of claim 1, further comprising appending a new data point to the display without discarding any historical data when the display is not full.
5. The method of claim 1, wherein the position of the icon determines the location of the first new data point occurring after the display is refreshed.

6. The method of claim 1, wherein representation includes a left side vertical axis and a right side vertical axis, wherein data points in proximity to the left-side vertical axis are older than data points in proximity to the right-side vertical axis.
7. The method of claim 6, wherein positioning of the icon at the left-side vertical axis will erase all historical data when the representation is refreshed and wherein positioning of the icon at the right side vertical axis will erase a single data point when the representation is refreshed.
8. A data processing system, including a processor, memory, and a display, comprising:

computer code means for representing real time data in a graphical format on the display;

computer code means for displaying a user-positionable icon as part of the graphical representation and for determining the position of the icon; and

computer code means for refreshing the graphical representation responsive to receiving a new data point, wherein the position of the icon determines how much historical data is retained in the refreshed display.
9. The system of claim 8, wherein the graphical representation is refreshed when the graphical representation is full.
10. The system of claim 9, wherein the code means for refreshing the representation comprises code means for shifting all data points horizontally by a displacement, wherein the displacement is determined by the position of the icon.

11. The system of claim 8, further comprising code means for appending a new data point to the display without discarding any historical data when the display is not full.
12. The system of claim 8, wherein the position of the icon determines the location of the first new data point occurring after the display is refreshed.
13. The system of claim 8, wherein representation includes a left side vertical axis and a right side vertical axis, wherein data points in proximity to the left-side vertical axis are older than data points in proximity to the right-side vertical axis.
14. The system of claim 13, wherein positioning of the icon at the left-side vertical axis will erase all historical data when the representation is refreshed and wherein positioning of the icon at the right side vertical axis will erase a single data point when the representation is refreshed.
15. A computer program product for displaying real time data on a data processing system, the product being stored on a computer readable medium and comprising:

computer code means for generating a graphical representation of the real time data on the display wherein the graphical representation includes a horizontal axis representing time and a vertical axis represents a parameter of interest;

computer code means for displaying a user-positionable icon as part of the graphical representation and for determining the position of the icon wherein the user positionable icon is moveable along the horizontal axis; and

computer code means for refreshing the graphical representation responsive to receiving a new data point, wherein the position of the icon along the horizontal axis determines how much historical data is retained in the refreshed graphical representation.

16. The computer program product of claim 15, wherein the graphical representation is refreshed when the graphical representation is full.
17. The computer program product of claim 16, wherein the code means for refreshing the representation comprises code means for shifting all data points horizontally by a displacement, wherein the displacement is determined by the position of the icon.
18. The computer program product of claim 15, further comprising code means for appending a new data point to the display without discarding any historical data when the display is not full.
19. The computer program product of claim 15, wherein the position of the icon determines the location of the first new data point occurring after the display is refreshed.
20. The computer program product of claim 15, wherein representation includes a left side vertical axis and a right side vertical axis, wherein data points in proximity to the left-side vertical axis are older than data points in proximity to the right-side vertical axis.
21. The computer program product of claim 20, wherein positioning of the icon at the left-side vertical axis will erase all historical data when the representation is refreshed and wherein positioning of the icon at the right side vertical axis will erase a single data point when the representation is refreshed.

**APPENDIX OF EVIDENCE
ON APPEAL IN PATENT APPLICATION OF
MESERTH, ET AL, SERIAL NO. 10/075,861**

This is an evidence appendix in accordance with 37 CFR § 41.37(c)(1)(ix).

There is in this case no evidence submitted pursuant to 37 CFR §§ 1.130, 1.131, or 1.132, nor is there in this case any other evidence entered by the examiner and relied upon by the Appellants.

RELATED PROCEEDINGS APPENDIX

This is a related proceedings appendix in accordance with 37 CFR § 41.37(c)(1)(x). On November 19, 2008, the Board of Patent Appeals and Interferences ('BPAI') rendered a decision on Appeal No. 2008-2296 for the present application reversing the Examiner's rejections. A copy of the November 19, 2008 decision on Appeal No. 2008-2296 was filed with the present Appeal Brief.